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The President's Page

By AUGUSTUS F. MACK, JR.
President, Los Angeles Bar Association

President Gus Mack

Effective committee work is the backbone of the Association. Throughout the years we have been most fortunate in having both standing and special committees who have taken their assignments seriously, and who have done the work ably and well.

I should like to discuss briefly several special committees whose work stemmed largely from the fact that this is a legislative year in California. Some months ago a special committee was appointed to evolve, if possible, a practical solution to the oft attempted amendment of Section 423 Probate Code having to do with nomination of administrators. The committee, headed by W. Claude Fields, Jr., solved the problem by drafting and introducing Senate Bill 2573.

This bill meets the objection of the smaller counties by providing that a non-resident otherwise entitled to letters of administration may nominate the administrator in a county having a charter and which charter requires that the County Counsel or District Attorney act as attorney for the Public Administrator in the probate of estates. The bill is presently before the Judiciary Committee of the California Senate for consideration, and it is hoped that it will be reported out favorably. Mr. Joseph K. Horton, a member

of the Board of Trustees, will appear before the committee in Sacramento at the hearing on the bill.

Another special committee which has rendered yeoman service is the Special Committee on the Survey of Los Angeles Metropolitan Trial Courts. This committee, of which Gordon L. Files is Chairman, studied the many recommendations in the Survey for months, and made a comprehensive and outstanding written report to the Board of Trustees. The Board in turn carefully reviewed the committee's report item by item, and made its recommendations. Those recommendations have been carefully reviewed by a Coordinating Committee of all organizations involved, and appropriate measures introduced in the legislature to carry out only such recommendations as were unanimously or by large majority agreed upon in the Coordinating Committee.

The State Bar requested review of its Legislative Program this year and, accordingly, a special committee of the Association with Gordon F. Hampton as Chairman, did the job. Their excellent report was reviewed by the Board of Trustees and the action of the Board on the various measures was immediately communicated to President Joseph A. Ball of the State Bar.

These committees had a dead line to meet. The work had to be done expeditiously, but thoroughly, and in workmanlike manner. Our thanks extend to them all for their fine performance.

Unlawful Practice of Law

"PRACTICE OF LAW" CONCEPT

By LOUIS I. MALLETTE*

It is almost universally conceded, and is a premise of this writing, that the "practice of law" is a function to be performed exclusively by members of the legal profession.[1]

At first glance, this proposition may seem to impeach the utility of a comment upon unlawful "practice of law." In fact, however, it serves two important preliminary purposes: first, it illustrates that the problem is one of determining who is to perform certain acts; second, it suggests that this determination will depend upon a characterization of those acts. "Practice of law" being the phrase by which conduct is characterized as within the exclusive domain of attorneys, it is necessary at the outset to give content to the concept of "practice of law."

In nearly all states there are statutes prohibiting the unauthorized "practice of law," i.e., "practice of law" by persons other than members of the bar in good standing.[2] However, this is not to imply that the prohibition depends upon the existence of a statute, since even in the two states without statutes, unauthorized "practice of law" may be restrained or punished as contempt.[3]

In seven states, the prohibited conduct is not defined beyond the phrase "practice of law."[4] In four states, the description of the prohibited conduct is in substantially equivalent language.[5] And in eleven states, the phrase "practice of law," or equivalent lan-

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[1]One court has expressed approval of limited, "incidental" unauthorized "practice of law" as a matter of commercial necessity. See Rosenthal v. Lawyers County Trust Co., 156 Misc. 910, 282 N.Y. Supp. 868 (N.Y. Munic. Ct. 1935). This raises a question of language rather than of substance, and the better approach would seem to be that if particular conduct is properly performed by laymen, then it is not "practice of law."

[2]Kansas and Vermont have no specific statutory prohibition.

[3]Merrick v. American Security and Trust Co., 107 F.2d 271 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940) (No statute in the District); Denew v. Wichita Retail Credit Ass'n, 142 Kan. 403, 42 P.2d 214 (1935); In re Ripley, 109 Vt. 83, 191 Atl. 918 (1937). Moreover, even in those states having a statutory prohibition a contempt action may be brought in the alternative. See, People v. Newer, 125 Colo. 303, 242 P.2d 615 (1952).

[4]Ariz. Rev. Stat. Sec. 32-261 (1955); Cal. Bus. & Prof. Code Ann. Sec. 6125 (1950); Ky. Rev. Stat. Sec. 30.010 (1953); Nev. Comp. Laws Sec. 588 (1929); Okla. Stat. tit. 5, c. 1, art. 3, Sec. 2 (1951); Va. Code Sec. 54-44 (1950) (See, however, Va. Code Sec. 55-167.1); Wyo. Comp. Stat. Ann. Sec. 2-418 (1945). E.g., "No person shall practice law in this state unless he is an active member of the state bar." Cal. Bus. & Prof. Code, *supra*.

[5]Del. Code Ann. Secs. 2119, 2301, (1953); N.D. Rev. Code Sec. 27-1101 (1943); S.C. Code Sec. 56-141 (1952); S.D. Code Sec. 32.1101 (1939). *E.g.*, "No person whatsoever shall practice or solicit the cause of any other person in any court of this state unless he has been admitted and sworn as an attorney, . . ." S.C. Code Sec. 312 (1942).

guage, is supplemented by a prohibition against manifesting an authorization to perform the prohibited conduct.[6] Thus in twenty-four states, the determination of the content of the phrase "practice of law" is squarely presented.[7]

Perhaps the most widely accepted definition is that given by an early Indiana court in *Eley v. Miller*:[8]

> As the term is generally understood, the 'practice' of law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.

However, not all courts have been willing to accept the wisdom or validity of a precise definition of the phrase. Thus it has been said that "The line between what is and what is not the practice of law cannot be drawn with precision";[9] that "It would be extremely difficult to formulate an accurate definition of the 'practice of law' which might endure . . .";[10] that "There is a twilight zone, and of necessity must be, where the question of whether acts done are a contempt of court as involving a practice of law are to be judged by the surrounding circumstances and not by the inherent character of the acts themselves."[11] Upon a moment's reflection, the truth of these assertions becomes apparent. Of course it is clear that there are certain acts which all agree involve the "practice of law," for example, the act of appearing in court as the advocate of another, or the act of developing and drafting a dispositive instrument for another. But this is not to say that all acts done by attorneys, even customarily, in the practice of their profession, constitute the "practice of law," as that term is used

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[6]Fla. Stat. Sec. 454.23 (1951); Idaho Code Ann. Sec. 3-420 (1948); Ill. Rev. Stat. c. 38, Sec. 298 (1951); Iowa Code Ann. c. 665, Sec. 665.3 (1949); Mass. Ann. Laws c. 221, Sec. 46A (1955); Mich. Stat. Ann. Sec. 27.81 (1943); Ohio Gen. Code Ann. Sec. 1698-1 (1938) (prohibits only the manifestation expressly); Ore. Rev. Stat. Sec. 9.160 (1953); Pa. Stat. Ann. tit. 17, Sec. 1608 (Supp. 1952); Utah Code Ann. Sec. 78-51-25 (1953); Wash. Rev. Code Sec. 9.23.010 (1951). *E.g.*, "If any person shall practice law or hold himself out as qualified to practice law . . ." Idaho Code Ann., *supra*.

[7]The phrase "practice of law" is sufficiently definite to be capable of constitutional application. People v. Ring, 26 Cal.App.2d 768, 70 P.2d 281 (Sup. Ct. 1937); People v. Merchants' Protective Corp., 189 Cal. 531, 209 Pac. 363 (1922); Richmond Ass'n of Credit Men v. Bar Ass'n, 167 Va. 327, 189 S.E. 153 (1937).

[8]7 Ind.App. 529, 34 N.E. 836 (1893).

[9]Cowern v. Nelson, 207 Minn. 642, 646, 290 N.W. 795, 797 (1940).

[10]Grand Rapids Bar Ass'n v. Denkema, 290 Mich. 56, 64, 287 N.W. 377, 380 (1939).

[11]People v. Jersin, 101 Colo. 406, 410, 74 P.2d 668, 669, (1937). *See* Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 181, 52 N.E.2d 27, 31 (1943).

to prohibit certain conduct by laymen.[12] Attorneys customarily draft negotiable instruments and render advice as to the legal effect of regulatory statutes; yet no one would condemn the act of a bank teller in preparing a check for a depositor, nor the act of an architect in advising the home-builder that the law requires a five-foot foundation. It is a fair inference from these observations that when one speaks in terms of restraining the activities of laymen, then "practice of law" means that part of the professional conduct of attorneys properly performed only by attorneys.[13] That is, laymen are prohibited from performing acts which require the knowledge and skill of an attorney, or for some reason require the existence of the attorney-client relationship.

In the remaining twenty-four states there is a statutory definition of the phrase "practice of law," or, at least, there is a greater degree of specificity in the description of the prohibited conduct.[14] In these states there are considerable variations in the statutory language, producing variable results when applied to substantially the same conduct.[15] Some of these statutes are comparatively brief; thus, that of Maryland provides:[16]

> No person shall practice the profession or perform the services of an attorney within this state without being admitted to the bar as hereinafter directed; and any person who shall give legal advice, represent any person in the trial of any case at law or in equity . . . or prepare any written instrument affecting the title to real estate, for pay or reward, shall be deemed an attorney at law for the purposes of this article.

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[12]*See* Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 181, 52 N.E.2d 27, 31 (1943); People v. Title Guarantee & Trust Co., 227 N.Y. 366, 374, 125 N.E. 666, 668 (1919), *motion for reargument denied*, 228 N.Y. 585, 127 N.E. 919 (1920).

[13]*See* In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 286, 288 Pac. 157, 159 (1930); State v. Childe, 139 Neb. 91, 97, 295 N.W. 381, 385 (1941).

[14]Ala. Code tit. 46, Sec. 42 (1940); Ark. Stat. Ann. Sec. 25-205 (1947); Colo. Rev. Stat. Sec. 12-1-17 (1953); Conn. Gen. Stat. Sec. 7641 (1949); Ga. Code Ann. Sec. 9-401 (1936); Ind. Ann. Stat. Sec. 4-3601 (Burns 1933); La. Rev. Stat. Sec. 37.212 (1950); Me. Rev. Stat. c. 105, Sec. 8 (1954); Md. Ann. Code Gen. Laws art. 10, Sec. 1 (1951); Minn. Stat. Sec. 481.02 (1949); Miss. Code Ann. Sec. 8682 (1942); Mo. Ann. Stat. Sec. 484.010 (Vernon 1949); Mont. Rev. Code Ann. Sec. 93-2009 (1947); Neb. Rev. Stat. Sec. 7-101 (1943); N.H. Rev. Ann. Stat. c. 311, Sec. 9 (1955); N.J. Ann. Stat. Secs. 2A:170-78, 2A:170-79, 2A:170-80 (1953); N.M. Stat. Ann. Secs. 18-1-26, 18-1-27 (1953); N.Y. Penal Law Secs. 270, 271, 280 (1944); N.C. Gen. Stat. Sec. 84-4 (Supp. 1955); R.I. Gen. Laws c. 612, Sec. 43 (1938); Tenn. Code Ann. Sec. 29.108 (1955); Tex. Civ. Code art. 3202-1 (Supp. 1956); W.Va. Code Ann. Sec. 2853 (1955); Wis. Stat. Sec. 256.30 (1950).

There are constitutional questions as to the efficacy of legislative definitions. *See* In re Opinion of the Justices, 289 Mass. 607, 612, 194 N.E. 313, 316 (1935); Clark v. Reardon, 231 Mo.App. 666, 671, 104 S.W. 2d 407, 410 (1937). However, as a matter of practice it appears, and for the purposes of this paper it will be assumed, that the legislative definition will be given judicial effect. See Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940).

[15]*Compare* People v. Sipper, 61 Cal.App. 2d 844, 142 P.2d 960 (Sup. Ct. 1943), *with* In re Umble's Estate, 117 Pa.Super. 15, 177 Atl. 340 (1935).

[16]Md. Ann. Code Gen. Laws art. 10, Sec. 1 (1951).

Others are more comprehensive, e.g., that of Alabama provides:[17]

For the purposes of this article, the practice of law is defined as follows: Whoever, (a) in a representative capacity appears as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending or prospective before a court or a justice of the peace, or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; or (b) for a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or (c) for a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity in behalf of another tending to obtain or secure

[17]Ala. Code tit. 46, Sec. 42 (1940).

for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or (d) as a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law.

From a single reading of these statutes, in the light of the preceeding remarks, one will surmise that the problem of unauthorized "practice of law" is not settled by their existence. The difficulties of applying the statutory definitions are apparent: the brief definitions exclude acts which are obviously "practice of law," e.g., under the Maryland statute a layman drafting a will disposing of personalty is not within the language of the prohibition; also, a literal interpretation of the lengthy definitions would condemn the acts of the bank teller and the architect noted above.[18] Consequently, the courts have engaged in extensive construction of these statutes in order to secure results consistent with their purpose.[19]

Grounds Advanced in Support of the Prohibition Against Unlawful "Practice of Law"

In order fairly to present the case against unlawful "practice of law," the reasons for the prohibition will be considered separately.

Incompetency of a non-attorney to practice law. The most obvious objection to the "practice of law" by persons other than members of the bar is that they are not competent to do so.[20] Generally, it may be said that non-attorneys are in fact not competent to engage in the "practice of law," and that their efforts are likely to result in delay, frustration and litigation.[21]

Immunity of a non-attorney from disciplinary proceedings. A second reason given for the prohibition against unauthorized "prac-

[18]See pages 2 and 3, *supra*. Of course, the converse situation may appear; the brief definition may be literally too inclusive, while the lengthy definition may be too restrictive.

[19]Uncertainty as to the meaning of "practice of law" has resulted in "treaties" between local bar associations and laymen, designed to define the respective fields of each and to provide co-operative machinery. See *Agreement Between The State Bar of California and the California Land Title Association*, 11 Cal. S. B. J. 190 (1936). Such agreements will be given weight by the courts. People v. Denver Clearing House Banks, 99 Colo. 50, 52, 59 P.2d 468, 469 (1936).

[20]Kendall v. Boiling, 295 Ky. 782, 789, 175 S.W.2d 489, 493 (1944); *accord*, In re Opinion of the Justices, 289 Mass. 607, 613, 194 N.E. 313, 317 (1935); In re Co-Operative Law Co., 198 N.Y. 479, 483, 92 N.E. 15, 16 (1910).

[21]*See* Commonwealth v. Jones & Robins, 186 Va. 30, 36, 41 S.E.2d 720, 724 (1947); note, 5 J. Am. Jud. Soc'y 52, 53 (1931).

tice of law," is that the non-attorney is not subject to the discipline of the court.[22]

Absence of legal traditions in the conduct of a non-attorney. It is said that a non-attorney in business for profit is unfit to engage in the "practice of law," because he substitutes commercialism for legal traditions and ethics.[23] The objection is not to the profit motive *per se,* but rather to the emphasis upon it. Selling and advertising the "practice of law" is thought to be incompatible with the office of an attorney;[24] one aiding in the administration of justice cannot subordinate legal traditions and ethics to a balance sheet.[25]

Absence of the attorney-client relationship. An intensely practical objection to "practice of law" by non-attorneys is the absence of the normal attorney-client relation. This is particularly evident where the non-attorney is a corporation, for the relation of attorney and client "cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation."[26] It is the duty of the attorney to serve the best interests of his client; a corporate attorney-agent, however, is under a duty as agent to serve the best interests of his employer. This results in a conflict of interests which in practice only too often may be resolved in favor of the employer-corporation.[27]

Unlawful practice of law by non-attorneys would not be in the public interest. It is frequently stated that to allow non-attorneys to engage in the "practice of law" would be detrimental to the public welfare.[28] Because this reason for the prohibition against unlawful practice comprehends the preceding objections by being a tacit premise of each of them,[29] it merits individual consideration. In the first place it gives added meaning to the preceding objections

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[22]*See* In re Opinion of the Justices, 289 Mass. 607, 613, 194 N.E. 313, 317 (1935); People v. People's Trust Co., 180 App.Div. 494, 496, 167 N.Y.Supp. 767, 768 (2nd Dep't 1917); In re Co-Operative Law Co., 198 N.Y. 479, 483, 92 N.E. 15, 16 (1910); Childs v. Smeltzer, 315 Pa. 9, 15, 171 Atl. 883, 886 (1934); Richmond Ass'n of Credit Men v. Bar Ass'n, 167 Va. 327, 334, 189 S.E. 153, 157 (1937); State v. Merchants' Protective Corp., 105 Wash. 12, 17, 177 Pac. 694, 696 (1919); Hicks and Katz, *The Practice of Law by Laymen and Lay Agencies,* 41 Yale L. J. 69, 78 (1931).

[23]*See* In re Co-Operative Law Co., 198 N.Y. 479, 483, 92 N.E. 15, 16 (1910).

[24]*See, e.g.,* In re Maclub of America, 295 Mass. 45, 48, 3 N.E.2d 272, 273 (1936); In re Cohen, 261 Mass. 484, 487, 159 N.E. 495, 497 (1928).

[25]*See, e.g.,* In re Opinion of the Justices, 289 Mass. 607, 613, 194 N.E. 313, 317 (1935); 18 Tex. L. Rev. 321, 322 (1940). *Accord,* Pacific Employers Ins. Co. v. Carpenter, 10 Cal.App.2d 592, 595, 52 P.2d 992, 994 (1st Dist. 1935).

[26]In re Co-Operative Law Co., 198 N.Y. 479, 484, 92 N.E. 15, 16 (1910).

[27]*See e.g.,* People v. Ass'n of Real Estate Taxpayers, 354 Ill. 102, 109, 187 N.E. 823, 826 (1933); State v. St. Louis Union Trust Co., 335 Mo. 845, 869, 74 S.W. 2d 348, 359 (1934).

[28]*See, e.g.,* In re Baker, 8 N.J. 321, 334, 85 A.2d 505, 511 (1951); People v. Lawyers Title Corporation, 282 N.Y. 513, 521, 27 N.E.2d 30, 33 (1940); People v. Alfani, 227 N.Y. 334, 339, 125 N.E. 671, 673 (1919); United States Title Guaranty Co. v. Brown, 166 App.Div. 688, 690, 152 N.Y.Supp. 470, 472 (2nd Dep't 1915), *aff'd,* 217 N.Y. 628, 111 N.E. 828 (1916); 96 U. of Pa. L. Rev. 722 (1948); 25 Geo. L. Rev. 477 (1937).

[29]Except that of corporate incapacity. See note 30, *infra.*

by orienting them toward the object of "practice of law," viz., service to clients. Secondly, it furnishes a commendable rationale of the prohibition, indicating that protection of the bar from competition is not a controlling consideration,[30] although suggesting that any injury to the bar is against the public interest.

Factors Considered Significant in Determining What is and What is not the "Practice of Law"

In the preceding material, it has been illustrated that the crux of the problem of unauthorized "practice of law" lies in determining the comprehension of that phrase.[31] It is now proposed to consider the particular factors that the courts have thought significant in characterizing conduct as or as not "practice of law."

Whether the act was related to proceedings of a judicial nature. If the act in question is performed in a representative capacity in a court, invariably it will be characterized as "practice of law."[32] However, the "in-court" test is useful only to *include* acts within the concept of "practice of law"; the mere fact that an act is not done in connection with proceedings of a judicial nature does not

[30] *See* Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 180, 52 N.E.2d 27, 31 (1943); Clark v. Reardon, 231 Mo.App. 666, 670, 104 S.W.2d 407, 410 (1937); 29 Geo. L. Rev. 477 (1937). A reason assigned for the prohibition against corporate "practice of law" is that "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." Dartmouth College v. Woodward, 4 Wheat. 516, 636 (U.S. 1819). Such a "person" is legally incapable of satisfying the legal requirements, provided by statutes and rules of court, precedent to authorized "practice of law." A corporation cannot attend a law school, cannot pass a bar examination, cannot take an oath of office. This incapacity, accordingly, is assigned as a reason for the prohibition against corporate "practice of law." *See* Mutual Bankers Corporation v. Covington, 277 Ky. 33, 38, 125 S.W. 2d 202, 204 (1939); In re Opinion of the Justices, 289 Mass. 607, 613, 194 N.E. 313, 317 (1935); Black & White Operating Co. v. Grosbart, 107 N.J.L. 63, 68. 151 Atl. 630, 633 (1930); Aberdeen Bindery v. Eastern States Printing & Publishing Co., 166 Miss. 904, 906, 3 N.Y.Supp.2d 419, 422 (Sup. Ct. 1938); In re Co-Operative Law Co., 198 N.Y. 479, 483, 92 N.E. 15, 16 (1910); State v. Merchants' Protective Corp., 105 Wash. 12. 17, 177 Pac. 694, 696 (1919). *Accord,* Kendall v. Beiling, 295 Ky. 782, 789, 175 S.W.2d 489, 493 (1944).

Some writers have expressed dissatisfaction with this reason. Thus it has been said that "there seems no basic, logical obstacle to the practice of law by a corporation, through its competent licensed agents." Wormser, *Corporations and the Practice of Law,* 5 Ford. L. Rev. 207, 211 (1936). See Lewis, *Corporate Capacity to Practice Law—A Study in Legal Hocus Pocus,* 2 Md. L. Rev. 342 (1938); Landels, *Observations Upon the Alleged Unauthorized Practice of the Law by Lay Agencies,* 15 Title News 20 (1935); 44 Harv. L. Rev. 1114 (1931). This attempt to "pierce the corporate veil" has no judicial authority, although it seems to have been accepted in Nebraska, by statute, viz: "All associations of members of the professions of law, medicine, divinity, architecture, engineering and of any and all other professions including associations not organized for pecuniary profit, and state or county agricultural associations, commercial clubs and other societies, may become incorporated and have all the powers, rights, duties and liabilities of corporations for the attainment of their respective purposes . . ." Neb. Rev. Stat. art. 9, Sec. 21-901 (1943).

[31] See p. 1, *supra.*

[32] People v. Motorists' Ass'n of Illinois, 354 Ill. 595, 188 N.E. 827 (1934) (conducting defense of actions); People v. Ass'n of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933) (institution of actions); United States Title Guaranty Co. v. Brown, 166 App.Div. 688, 152 N.Y.Supp. 470 (2nd Dep't 1915), *aff'd,* 217 N.Y. 628, 111 N.E. 828 (1916) (retention of counsel to conduct litigation); Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1935) (furnishing opinions in proceedings in court). Statutes in twenty-four states specifically prohibit conduct of an "in-court" nature. See, e.g., N.M. Stat. Ann. Sec. 18-1-26 (1953).

exclude it from comprehension within the concept of "practice of law."[33]

Whether the act was performed for a consideration. It is often mentioned, in the characterization of conduct of laymen as "practice of law," that it was done for a consideration.[34] However, when the issue has been raised, the prevailing view is that conduct may be "practice of law" although not performed for a consideration.[35]

Whether the non-attorney purported to be authorized to practice law. A third test employed to aid in the task of characterization, is whether the person involved *purported* to be authorized to engage in the "practice of law."[36] The presence of this factor has been considered quite significant in characterizing conduct as "practice of

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[33]*E.g.,* Virgin Islands Bar Association v. Dench, 124 F.Supp. 257 (D.C., Virgin Islands 1953); People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919); In re Pace, 170 App.Div. 818, 156 N.Y.Supp. 641 (Sup. Ct. 1915); Cain v. Merchants Nat. Bank and Trust Co., 66 N.D. 746, 268 N.W. 719 (1936); In re Duncan, 83 S.C. 186, 65 S.E. 211 (1909); Stewart Abstract Co. v. Judicial Commission, 131 S.W.2d 686 (Tex. 1939). See quotation from *Eley v. Miller,* p. 2, *supra.* In two cases, both under a statute, the "in-court" test was used to *exclude* conduct from the concept of "practice of law." Atlanta Title & Trust Co. v. Boykin, 172 Ga. 437, 157 S.E. 455 (1931); Dunlap v. Lebus, 112 Ky 237, 65 S.W. 441 (1901). The former has been repudiated, Boykin v. Hopkins, 174 Ga. 511, 162 S.E. 796 (1932), and the latter overruled by statute, Ky. Rev. Stat. Sec. 30.010 (1953). In two states, the statutes seem to adopt the "in-court" test exclusively. S.C. Code Sec. 56-141 (1952); S.D. Code Sec. 32.1101 (1939). In New Mexico, the "in-court" test is supplemented by a prohibition against "holding out." N.M. Stat. Ann.Sec. 18-1-26 (1953).

[34]*See, e.g.,* In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 286, 288 Pac. 157, 159 (1930); Hobson v. Kentucky Trust Co., 303 Ky. 493, 505, 197 S.W.2d 454, 462 (1946); State v. Bryan, 98 N.C. 644, 647, 4 S.E. 522, 523 (1887); Hexter Title & Abstract Co. v. Grievance Committee, 142 Tex. 506, 516, 179 S.W.2d 946, 951 (1944).

[35]People v. Jersin, 101 Colo. 406, 74 P.2d 668 (1937); People v. Motorists' Ass'n of Illinois, 354 Ill. 595, 188 N.E. 827 (1934); People v. Ass'n of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933); In re Baker, 8 N.J. 321, 85 A.2d 505 (1951); State v. Kirk, 133 Neb. 625, 276 N.W. 380 (1937); Wright v. Barlow, 131 Neb. 294, 268 N.W. 95 (1936). Of course, in most cases there will be some benefit to the person rendering the services, although it may be a "hidden" benefit. *See* State v. St. Louis Union Trust Co., 335 Mo. 845, 861, 74 S.W.2d 348, 354 (1934); Stewart Abstract Co. v. Judicial Commission, 131 S.W.2d 686, 690 (Tex. 1939).

In North Carolina, the statute provides "for or without a fee or consideration." N.C. Gen. Stat. Sec. 84-4 (Supp. 1955). In nine states there is a required element of compensation with regard to *some* acts, usually giving advice and drafting instruments. Ala. Code tit. 46, Sec. 42 (1940); La. Rev. Stat. Sec. 37.212 (1950); Md. Ann. Code Gen. Laws art. 10, Sec. 1 (1951); Minn. Stat. Sec. 481.02 (1949) (also, "with or without" as to some drafting); Mo. Ann. Stat. Sec. 484.010 (1949); R.I. Gen. Laws c. 612, Sec. 43 (1938); Tenn. Code Ann. Sec. 29-108 (1955); Tex. Civ. Code art. 3202-1 (Supp. 1956); Wis. Stat. Sec. 256.30 (1950). In Mississippi, the statutory definition requires compensation in all cases; but the definition itself does not appear to be intended to be all-inclusive. Miss. Code Ann. Sec. 8682 (1942).

[36]This test has also been reflected a great deal in the statutes. See note 6, *supra.* Also, in seventeen other states there is a specific prohibition against "holding out," "assuming," or "advertising." Ark. Stat. Ann. Sec. 25-205 (1947); Colo. Rev. Stat. Sec. 12-1-17 (1953); Conn. Gen. Stat. Sec. 7641 (1949); Ind. Ann. Stat. Sec. 4-3601 (Burns 1933); Me. Rev. Stat. c. 105, Sec. 8 (1954); Mass. Ann. Laws c. 221, Secs. 41, 46A (1955); Minn. Stat. Sec. 481.02 (1949); Mont. Rev. Code Ann. Sec. 93-2009 (1947); N.H. Rev. Ann. Stat. c. 311, Sec. 9 (1955); N.J. Ann. Stat. Secs. 2A:170-78, 2A:170-79 (1953); N.M. Stat. Ann. Sec. 18-1-26 (1953); N.Y. Penal Law Secs. 270, 280 (1944); N.C. Gen. Stat. Secs. 84-4, 84-5 (1949); R.I. Gen. Laws c. 612, Secs. 42, 44 (1938); S.C. Code Sec. 56-141 (1952); W.Va. Code Ann. Secs. 2853, 2854 (1955); Wis. Stat. Sec. 256.30 (1950).

law,"[37] and its absence has been given great weight where the courts found that there was no "practice of law."[38]

Whether, historically, the act has been performed by attorneys. It has been noted that not all acts customarily performed by attorneys constitute the "practice of law."[39] It has been considered significant, however, where conduct has not been characterized as "practice of law," that the act in question historically, or customarily, has been performed by laymen.[40]

Whether the instrument involved was complex. With regard to the drafting of instruments, there is substantial authority that a layman may prepare "simple" instruments for another.[41] On the other hand, many courts vehemently reject this proposition.[42] What is "simple" is incapable of practical definition, but that instruments vary widely in their complexity has been recognized and considered significant.[43]

Whether the act was primary to the business of the non-attorney.

[37] *See* Allman v. Winkelman, 106 F.2d 663, 665 (6th Cir. 1939), *cert. denied*, 309 U.S. 668 (1939); In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 287 288 Pac. 157, 160 (1930); People v. Alfani, 227 N.Y. 334, 338, 125 N.E. 671, 672 (1919); In re Lizette, 32 R.I. 386, 387, 79 Atl. 960 961 (1911); Hexter Title & Abstract Co. v. Grievance Committee, 142 Tex. 506, 516, 179 S.W.2d 946, 951 (1944); Stewart Abstract Co. v. Judicial Commission, 131 S.W.2d 686, 689 (Tex. 1939). *But see*, State v. Schmidt, 174 Kan. 581, 588, 258 P.2d 228, 233 (1953).

[38] *See* Merrick v. American Security & Trust Co., 107 F.2d 271, 275 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); People v. Jersin, 101 Colo. 406, 409, 74 P.2d 668, 669 (1937); People v. Title Guarantee & Trust Co., 227 N.Y. 366, 378, 125 N.E. 666, 671 (1919), *motion for reargument denied*, 228 N.Y. 585, 127 N.E. 919 (1920); La Brum v. Commonwealth Title Co., 358 Pa. 239, 247, 56 A.2d 246, 248 (1948). Where a statute prohibited engaging in the "law business," it has been held that that term requires a "holding out." Liberty Mut. Ins. Co. v. Jones, 344 Mo. 932, 130 S.W.2d 945 (1939). Statutes in seven states have such a prohibition. See, e.g., N.Y. Stock Corp. Law Sec. 7 (1944).

[39] See p. 3, *supra*.

[40] *See* In re Matthews, 58 Idaho 772, 779, 79 P.2d 535, 539 (1938); People v. Title Guarantee & Trust Co., 227 N.Y. 366, 374, 125 N.E. 666, 668 (1919), *motion for reargument denied*, 228 N.Y. 585, 127 N.E. 919 (1920); La Brum v. Commonwealth Title Co., 358 Pa. 239, 244, 56 A.2d 246, 248 (1948); Union City & Ohion County Bar Ass'n v. Waddell, 205 S.W.2d 573, 580 (Tenn. 1937).

[41] Merrick v. American Security & Trust Co., 107 F.2d 271 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); In re Matthews, 58 Idaho 772, 79 P.2d 535 (1938); Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943); Petitions of Ingham County Bar Ass'n, 342 Mich. 214, 69 N.W.2d 713 (1955); Wright v. Barlow, 131 Neb. 294, 268 N.W. 95 (1936); People v. Title Guarantee & Trust Co., *supra* note 40; Gustafson v. V. C. Taylor & Sons, 138 Ohio St. 392, 35 N.E.2d 435 (1941). *See* In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 286, 288 Pac. 157, 159 (1930); In re Opinion of the Justices, 289 Mass. 607, 615, 194 N.E. 313, 317 (1935); Gain v. Merchants Nat. Bank & Trust Co., 66 N.D. 746, 754, 268 N.W. 719, 723 (1936).

[42] People v. Lawyers Title Corporation, 282 N.Y. 513, 27 N.E.2d 30 (1940); Hexter Title & Abstract Co. v. Grievance Committee, 142 Tex. 506, 179 S.W.2d 946 (1944); Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wash.2d 697, 251 P.2d 619 (1953); Paul v. Stanley, 168 Wash. 371, 12 P.2d 401 (1932). Often quoted is the following from the concurring opinion of Pound, J., in People v. Title Guarantee & Trust Co., 227 N.Y. 366, 379, 125 N.E. 666, 670 (1919), *motion for reargument denied*, 228 N.Y. 585, 127 N.E. 919 (1920): "I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled, and the simple often trouble the inexperienced."

[43] The "simple document" text has been related to the question of competence. *See* Cain v. Merchants Nat. Bank & Trust Co., 66 N.D. 746, 268 N.W. 719 (1936); p. 5, *supra*.

Several cases in which conduct was held not to constitute "practice of law," relied heavily upon a finding that the conduct was "incidental" to the lawful business of the non-attorney.[44] In cases where the incidental test is raised as a defense, and fails, it is not because the test is rejected, but because it is found unsatisfied.[45] Since the same conduct is sometimes termed "incidental" and sometimes not, it would seem that the test merely furnishes a label for securing a result based upon other considerations.[46]

The foregoing, then, are the factors most often stressed by the courts when confronted with a "practice of law" problem.[47] The real significance of these factors better can be measured when each is considered in the light of the basic reason for the prohibition against unauthorized "practice of law," viz., the danger of injury to the public.

Whether the act in question occurred "in court," or was performed for a "consideration," obviously has no substantial relation to the public welfare. A person in need of legal services can be

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[44]*See* Merrick v. American Security & Trust Co., 107 F.2d 271, 276 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 181, 52 N.E.2d 27, 31 (1943); Petitions of Ingham County Bar Ass'n, 342 Mich. 214, 69 N.W.2d 713 (1955); Wollitzer v. National Title Guaranty Co., 148 Miss. 529, 532, 266 N.Y. Supp. 184 188 (Sup. Ct. 1933), *aff'd without opinion*, 241 App.Div. 757, 270 N.Y. Supp. 968 (2nd Dep't 1934); People v. Title Guarantee & Trust Co., *227* N.Y. 366, 371, 125 N.E. 666, 670 (1919), *motion for reargument denied*, 228 N.Y. 585, 127 N.E. 919 (1920); Cain v. Merchants Nat. Bank & Trust Co., 66 N.D. 746, 754, 268 N.W. 719, 723 (1936); La Brum v. Commonwealth Title Co., 358 Pa. 239, 246, 56 A.2d 246, 248 (1948). *Accord*, Ga. Code Ann. Sec. 9-401 (1936).

[45]*See* People v. Lawyers Title Corporation, 282 N.Y. 513, 520, 27 N.E.2d 30, 33 (1940); Hexter Title & Abstract Co. v. Grievance Committee, 142 Tex. 506, 518, 179 S.W.2d 946, 952 (1944); Commonwealth v. Jones & Robins, 186 Va. 30, 43, 41 S.E.2d 720, 723 (1947).

[46]One such consideration may be whether the layman *purported* to be authorized to engage in the "practice of law." See p. 8, *supra*.

Many cases place particular emphasis upon the needs and practices of business, reasoning that the conduct in question is essential to the proper operation of a legitimate business. *See* Merrick v. American Security & Trust Co., 107 F.2d 271, 276 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); In re Matthews, 58 Idaho 772, 779, 79 P.2d 535, 539 (1938); People v. Title Guarantee & Trust Co., 191 App.Div. 165, 166, 181 N.Y.Supp. 52, 53 (2nd Dep't 1920), *aff'd mem.*, 230 N.Y. 578, 130 N.E. 901 (1920). *Accord*, Ga. Code Ann. Sec. 9-401 (1936).

The "incidental" test best may be used to distinguish either those cases where the act in question constitute the *primary* business of the corporation, e.g., People v. Merchants' Protective Corp., 189 Cal. 531, 209 Pac. 363 (1922), or where the corporation actually was organized to engage in the "practice of law," e.g., In re Co-Operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910); In re Associated Lawyers Co., 134 App.Div. 350, 119 N.Y.Supp. 77 (1st Dep't 1909).

It has been suggested that the "incidental" test can be used only negatively i.e., if the activity is not incidental, it is probably improper. Merrick v. American Security & Trust Co., 107 F.2d 271, 284 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940) (Stephens, J., dissenting); Gardner v. Conway, 234 Minn. 468, 479-480, 48 N.W.2d 788, 795-796 (1951).

[47]It is often stated that the "test" of whether conduct is "practice of law" is whether it requires "legal knowledge and skill." *See* In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 286, 288 Pac. 157, 159 (1930); State v. Childe, 139 Neb. 91, 97, 295 N.W. 381, 385 (1941); Cain v. Merchants Nat. Bank & Trust Co., 66 N.D. 746, 752, 268 N.W. 719, 723 (1936). However, the obvious circuity of reasoning implicit in such a "test," would seem to make its use nugatory.

harmed equally by an act performed on his behalf out of court and gratis.

Whether the non-attorney "purported" to be authorized to engage in the "practice of law" does have some relation to the public welfare. Such a representation induces reliance upon services thought to be the result of an attorney's efforts, thereby creating a false sense of security. On the other hand, where the public well knows that the person is not authorized to engage in the "practice of law," then there is no deception, no unsuspecting reliance. It may be argued that there is no need to protect one who knowingly accepts the services of a fellow layman in the resolution of his problems.

To a lesser degree, the public welfare is related to whether the act in question historically, or customarily, has been performed by laymen. If laymen have always performed the act, then it may be argued that the public is adequately protected, since if they were not they would have resorted to attorneys. Further, where the act is customarily performed by laymen, there is no "holding out" and consequent deception. Finally, there may be considerations of economy and necessity here; it would be an impossible situation if all the acts performed by laymen that border on "practice of law" were required to be performed by attorneys.

The "simple document" test clearly can be related to the public welfare. Where the instrument is "truly" simple, there is no need to protect the public, for the very simplicity of the instrument will diminish the probability of errors, and should enable the public to protect itself. Again, it would be unthinkable that only attorneys should be allowed to prepare all instruments that "affect" legal rights and duties; public convenience and necessity compel some distinction between simple and complex instruments.

Analysis of the "incidental" test and its relation to the public welfare must await a further clarification of the test itself.

In most of the reported cases, as may be gathered from the repetition of citations, more than one factor is involved; in practice, the courts are thus aided by a combination of considerations in each case.

Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of March, 1932, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

President **Hoover** has signed the Norris Bill forbidding the issuance of injunctions by Federal courts against strikers without evidence of danger or injury to the interests against which a strike is directed and providing for jury trial where persons are cited for violation of injunctions.

* * *

Benjamin N. Cardozo of the New York Court of Appeal has taken office as an Associate Justice of the U. S. Supreme Court.

* * *

Charles A. Lindbergh, Jr., 19 months old, was kidnapped between 8 and 10 P.M. from the new Lindbergh home near Hopewell, New Jersey. The body was not discovered until May 12 in a thicket five miles from the baby's home. Thus ended an intensive search which had been carried on all over the world by every agency, both governmental and private. On the strength of an alleged ransom note left at his house, **Col. Lindbergh** paid through his intermediary, **John F. Condon,** $50,000 to an agent of the pretended kidnappers; and Mrs. **Evelyn Walsh McClean** of Washington, D. C., paid $100,000 to **Gaston B. Means** to be given by him to an agent or pretended agent of the kidnappers.

* * *

In Germany the presidential election resulted in **Von Hindenburg** winning 18,661,736 votes to Hitler's (Fascist) 11,328,571 votes. In the run-off election in April, **Von Hindenburg** won by a 2¼ million majority over Hitler for his second term of 7 years.

Tax Reminder

CAPITAL GAINS FOR AMATEUR SUBDIVIDERS

WILLIAM M. POINDEXTER*

Not only professional real estate traders and subdividers lose advantage of capital gains treatment on subdividing tracts of land, but also incidental investors in real property who subdivide unimproved land are very apt to have their profits treated as ordinary income. Section 1237 of the Internal Revenue Code of 1954 provides some relief for the amateur subdivider.

Under Section 1237 the amateur subdivider may treat profits as capital gains from sales of lots from a tract of land if he meets the requirements of that section. The main restrictions are that the taxpayer hold the property for five years; that during the holding period the tract is not held primarily for sale to customers; that in the year of subdivision the taxpayer does not hold other properties primarily for sale to customers; and that there are no substantial improvements such as roads, sewer lines and the like, let alone any construction. Some substantial improvements may be made if the property is held for ten years.

Section 1237 exempts from the five-year holding period requirement property which the taxpayer has acquired by inheritance. Other than this there is no explanation of holding period. Fortunately the proposed regulations issued recently throw some light on the holding period, and it appears that we can expect the following.

The regulations restrict the inheritance exception to cases of strict inheritance. Consequently a surviving joint tenant or the surviving owner of community property must still actually hold his one-half of the property for the requisite five years, although the decedent's half interest is excepted from the five-year rule.

If the property has the same basis in whole or part that it had in the hands of another person, the period such other person held the property may be added to the period the taxpayer holds it. Consequently, if the taxpayer acquires property by gift, he may tack on to his holding period the holding period of the donor. Likewise, where an individual acquires property and then transfers it to a partnership for the purpose of holding the property, the holding

*Member of the Los Angeles Bar, member of the Taxation Committee, Los Angeles Bar Association, member of the firm of Robertson and Poindexter.

period dates back to the date of acquisition by the contributing partner.

The partnership form of holding property offers considerable advantage. Partnership interests may be sold and new partners admitted as investors in the partnership without upsetting the holding period.

Social Security Reminder

Self-employed lawyers are covered by the Federal Social Security program beginning with their 1956 earnings. Important points are summarized below:

1. The coverage is compulsory. You must pay the social security self-employment tax if your net earnings from self-employment in 1956 were $400 or more.

2. For 1956 the tax is 3% of the first $4200 of net earnings. The tax is paid each year along with your U. S. Individual Income Tax Return, using Schedule SE of the form 1040.

3. If your 1956 self-employment tax has not been paid, it must be paid not later than April 15, 1957.

4. If you do not already have a social security card, you should get one. You must show your number on your Schedule SE in order to receive social security credit for the tax you pay.

5. If you have had a card but have lost it, ask for a duplicate. You may already have some credit for work done any time since 1937 as an employee, and you want your new credits to be added to the same account.

6. Even if you never had social security coverage before, the new coverage will—in most cases—begin providing valuable insurance protection to your family by April of this year.

7. A lawyer whose net earnings for 1956 were at least $4200 and whose net earnings continue to be at least $4200 a year until age 65 will, upon retirement, become eligible for the maximum social security payment of $108.50 a month.

8. Further information can be obtained at any Social Security District Office. There are nine in Los Angeles County, listed in the telephone directory under U. S. Government, Department of Health, Education and Welfare.

IN MEMORIAM

Upon motion duly made and seconded, the following resolution was unanimously adopted by the Board of Trustees:

WHEREAS, Providence, in infinite yet inscrutable wisdom, has called from us our esteemed and beloved Kemper Campbell; and

WHEREAS, following his admission to the California Bar in 1907 he devoted great talents and extensive efforts unstintingly to the welfare of this Association, serving as President in 1927 and before and after, serving as chairman of many of the more important committees of this Association; and

WHEREAS, during the formative years of the California State Bar he labored indefatigably toward its integration and incorporation and following the accomplishment thereof, he served as one of the first members of its Board of Governors; and

WHEREAS, during all these colorful and crowded years he demonstrated remarkable traits of leadership and attained notable success and celebrity as advocate, teacher, political and civic leader and, above all, he exemplified all things good in pulsating friendship and admirable sportsmanship;

NOW, THEREFORE, BE IT RESOLVED that in the passing of Kemper Campbell this Association has sustained the loss of one of its great founders and leaders;

RESOLVED FURTHER that it is altogether fitting that his capabilities, attainments and qualities be memorialized by these resolutions so that others may read and know and be the better for doing so;

AND RESOLVED FINALLY that these resolutions be spread upon the permanent minutes of this Association and that a copy thereof, duly inscribed by the officers, be transmitted to the family and loved ones of our departed and lamented leader.

Special Report on the Holbrook Courts Survey

On October 1, 1956, a special committee was appointed for the purpose of studying and reporting to the Board of Trustees concerning recommendations contained in *"A Survey of Metropolitan Trial Courts—Los Angeles Area"* by James G. Holbrook under a grant from the Haynes Foundation.

The Committee was composed of the following: Gordon L. Files, Chairman; Seth M. Hufstedler, Vice-Chairman; Frank B. Belcher, Harold A. Black, Grant B. Cooper, E. Avery Crary, Hon. Burdette J. Daniels, Donald A. Dewar, Walter Ely, William I. Gilbert, Jr., Jess F. High, Hon. Clarke E. Stephens, Leslie C. Tupper, Sherman S. Welpton, Jr., and Pierce Works.

On February 26, 1957 the Committee presented its report to the Board of Trustees, who thereafter studied it and acted upon each of the recommendations separately. In the report that follows, the Board of Trustees, by resolution, adopted and approved of each of the recommendations of the Committee, except in the few instances where the contrary is indicated in the discussion.

Recommendation A — Branch Court System

The Survey recommends that the branch courts of the Superior Court of Los Angeles County should be so located as ultimately to create no more than nine branches. To accomplish this, the Survey proposes an immediate moratorium on the creation of branch courts for at least two years.

The Committee approves an immediate moratorium on the creation of new branch courts for at least two years. It is assumed that during the moratorium the Legislature and others will study the problem. Any recommendation from this Association as to the number and location of branch courts should be withheld pending such study.

Recommendation B — Integration of Municipal Courts

The Survey recommends that for administrative purposes all municipal courts of Los Angeles County should be integrated into one Los Angeles County Municipal Court.

The Committee approves by vote of 9 in favor, 2 opposed. The majority believe that Professor Holbrook is correct in his thesis

that integration will result in desirable uniformity of practice, greater flexibility in the assignment of personnel, and the adoption of more efficient methods, particularly in some of the outlying courts. One member feels that integration would militate against keeping the Courts "close to the people" and one member feels that voluntary cooperation rather than integration will be adequate to bring about any necessary reforms.

Recommendation C — Qualifications Commission for Judges

The Survey recommends that appointments of Superior and Municipal Court Judges by the Governor be made from a panel of three persons named by an enlarged qualifications commission, and that such judges should run for re-election only against their records.

(1) The recommendation that appointments be made from a panel of qualified persons named by an enlarged qualifications commission is approved by a vote of 10 to 1. The panel should be made up of *at least* three candidates. Professor Holbrook has explained that the Qualifications Commission should, upon request from the Governor, furnish the names of additional qualified candidates. The Committee believes it an important feature of this plan that the Governor is not forced to choose from among only three candidates, all of whom may be unacceptable to him. The real aim is to eliminate unqualified candidates, not to give the full appointive power to the Commission. The Committee is not expressing any opinion on the exact makeup of the proposed Qualifications Commission. This is a subject on which there is room for considerable difference of opinion.

(2) The recommendation that Superior Court and Municipal Court Judges run for re-election only against their records is disapproved, 8 voting to disapprove and 3 voting for approval. The majority feel that the voters should retain the opportunity to elect a person to judicial office.

Recommendation D — Disciplinary Body for Judges

The Survey recommends that a specially constituted disciplinary body should be given disciplinary power over judges of the Superior, Municipal and Justice Courts.

The Board approves and adopts the following part of the Committee's recommendation:

The Committee approves, but without passing upon the suggestions made in the Survey as to the composition of the disciplinary body. The selection, composition and tenure of the disciplinary

body is a matter of the greatest importance and deserves further study on a state-wide basis.

Recommendation E — Compulsory Retirement Age for Judges

The Survey recommends that a compulsory retirement age for judges of the Superior, Municipal and Justice Courts should be established.

The Committee approves by a vote of 8 favoring and 3 opposed. Although Professor Holbrook has suggested 70 as the retirement age, this Committee did not attempt to reach any conclusion as to what the age should be. The Committee further recommends that all Justices of the District Courts of Appeal and the Supreme Court be included in the proposal for a compulsory retirement.

Recommendation F — Increasing Terms of Judges

The Survey recommends that if recommendations C, D, and E are adopted, terms of offices of all Superior and Municipal Court Judges should be increased from 6 to 12 years.

The Committee disapproves. No matter what system of selecting judges is employed, it is always possible to make a mistake. It is not considered a great hardship for a judge to run for re-election in Los Angeles County after six years in view of the infrequent opposition to incumbents. Furthermore, if recommendation C were to be adopted (which Professor Holbrook considers a prerequisite to recommendation F), it would be even less a hardship for a judge to run for re-election against his record. Only a very unpopular judge would be likely to be defeated and such a judge should be defeated at the end of six years.

Recommendation G — Presiding Judges' Powers, Tenure, Compensation

The Survey recommends that the Presiding Judge of both the Superior Court and of the Municipal Court be given longer tenure, greater powers and added compensation.

(1) *Powers and Compensation.* The Committee approves the recommendation that the Presiding Judge of both the Superior Court and the Municipal Court should be given greater powers and added compensation.

(2) *Tenure.* The recommendation that the Presiding Judge be given a longer tenure is disapproved by a vote of 10 to 1. It has been reported that Judge Richards and Judge Herndon each feels that he accomplished more in his first year as Presiding Judge than his second year. The judges argue that the prospect of a three-year term may deter some from accepting the office of Presiding Judge. It is also pointed out that the success of the Presiding

Judge is governed largely by his ability to obtain cooperation, and if the judges of the Court want to replace a Presiding Judge at the end of one year it is better to let them do so.

Recommendation H — Executive Officer

The Survey recommends that there be created the office of Executive Officer for the Los Angeles Superior Court and the Los Angeles Municipal Court. This is approved by a vote of 10 favoring, 1 abstaining.

Recommendation I — Court Statistician

The Survey recommends that the Superior Court and the Los Angeles Municipal Court each employ a full-time statistician. The Committee recommends that the Los Angeles Bar Association take no position. This is an administrative detail which should be determined by the Judges and by the Court's Executive Officer, if there be one.

Upon motion duly made and seconded, it was voted that the recommendation be approved and adopted; the vote being 8 to 5 in favor of the motion.

Recommendation J — Juries, Size and Compensation

The Survey recommends that the number of jurors in a civil case should be decreased, jurors should be granted more adequate compensation, and juries should be furnished to litigants at a flat fee.

(1) *Size.* The explanatory paragraph following this recommendation in the Survey says, *"in the absence of demand by either party,* a civil jury should consist of eight persons and the concurrence of six should be required for a verdict." This recommendation as so limited is approved by a vote of 9 to 2. This means that either party upon demand will be entitled to the traditional 12-man jury in which the concurrence of 9 is required for a verdict. A majority of the Committee does not favor compelling a litigant to try a civil case before a jury of less than twelve persons. A majority of the Committee favors the preservation of the traditional trial by jury in civil cases and feels that a compulsory reduction in the size of juries would constitute a step towards abolition of jury trials.

(2) *Compensation.* The explanatory matter in the Survey suggests that the individual fee for jury service should be increased from $3.00 to $6.00 per day and mileage. Six members of the Committee (out of ten present) favor an increase of jury fees from $3.00 to $4.00 per day and mileage. Four favor $6.00 plus mileage. The majority feel that jury service should be regarded as a civic duty and the jury fee should not be considered as compensation

for services. Some increase in jury fees is warranted, however, to make sure that the fees paid will at least cover parking and lunch money. However, jurors' fees must be considered in terms of overall cost to the county and to the litigants, and this question is thus tied into the problem of allocation of jury costs. Any increase in jurors' per diem would make even more acute the existing controversy over who shall pay for the jury. The Board approves and adopts the proposal to increase the jury fee from $3.00 to $6.00 per day and mileage.

(3) *Flat Fee.* The explanatory matter in the Survey proposes that the fee to be paid by a party for an 8-man jury should be fixed at $48.00 per trial, and that the county pay all costs above that amount, including mileage. A majority of the Committee disapproves this recommendation. By a vote of 7 to 3 the Committee recommends that the litigant who demands an 8-man jury be required to advance the per diem for eight jurors for each day of trial, while the county pays mileage and other jury expenses. The per diem furnished by the party should be taxable as costs. The minority (3) favors a flat fee per trial equal to the first day's jury

fee. By a vote of 9 to 2 the Committee recommends further that if either litigant demands a 12-man jury he shall be required to pay the per diem of the additional 4 jurors, which additional amount shall not be taxable as costs. This is intended as an inducement to litigants to accept an optional 8-man jury.

Recommendation K — Juries: Key Number System

The Survey recommends that juries of all outlying Municipal Courts should be selected by the key number system now employed by the Superior Court, the Los Angeles Municipal Court and certain outlying courts.

The Committee approves. The use of volunteer jurors, solicited by newspaper advertisements, is a particularly unwholesome practice.

Recommendation L — New Jersey Plan: Transfer of Superior Court Cases to the Municipal Court

The Committee reports:

The Survey recommends that in the pretrial conference the Judge of the Superior Court should summarily transfer a case to the Municipal Court if it appeared to him that the damages would be reasonably anticipated to fall below the limit of Municipal Court jurisdiction. The explanatory note adds that if the case is so transferred, the Municipal Court should then have jurisdiction to enter judgment for any amount without dollar limitation so that the plaintiff would be able to recover whatever amount the evidence showed to be due in spite of the fact that he was in the Municipal Court.

The Committee (by a vote of 7 to 6) approves recommendation L in principle and further recommends that the jurisdiction of the Municipal Court be increased and that mandatory sanctions be imposed in the Superior Court when the judgment recovered in that Court is less than the jurisdictional limit of the Municipal Court. Members of the Committee have various opinions as to the best way of dealing with the problem of eliminating from the Superior Court those cases which belong in Municipal Court. Some members feel it would be futile to adopt the New Jersey plan because any plaintiff's lawyer could make a showing at pretrial which would indicate the possibility of a judgment in excess of $3,000 and thus prevent transfer. On the other hand, the experience in New Jersey as cited by the Survey indicates that almost one-fourth of the cases in the Superior Court were transferred at pretrial. Some members of the Committee feel that the pretrial

decision to transfer a case would place an unfair stigma upon the plaintiff's claim and would make it more difficult psychologically for a plaintiff to recover more than $3,000 if the evidence at the trial justified a larger judgment. Some members of the Committee would be more inclined to favor the New Jersey plan if they could see a satisfactory solution to some of the procedural and jurisdictional problems which would be involved. For example, if plaintiff recovered judgment in the Municipal Court in excess of $3,000, appellate jurisdiction should be to some court higher than the Appellate Department of the Superior Court. Some members of the Committee feel that the Judicial Council's proposal for a single county-wide court may be preferable to the New Jersey plan. All of the Committee agrees that before recommendation L is adopted by the Legislature there should be a study of the practical and procedural problems involved.

The Board to take no action at this time on the Committee's recommendation in the absence of sufficient detail and data and that the Association study the matter further at a future appropriate time.

(To be Concluded in a Subsequent Issue)

Report of the Committee on Administrative Law of the Los Angeles Bar Association, 1956-1957

Since the years 1949-1950 the committee on administrative law has been engaged in studying the many local administrative boards and agencies operating throughout California which exercise quasi-judicial functions.

Consideration was given to the desirability of drafting an administrative practices act for use by local agencies. Such an act, it appeared, would be most useful in three general areas, to wit, zoning, building permits, and certain licensing activities as, for example, those of the Los Angeles Police Commission. City and County administrative practices in those three areas were studied, but the studies revealed no dissatisfaction by local officials with the present situation nor any great interest in a new general procedural ordinance. The committee believed that there was great room for improvement of administrative procedures in the field of special districts, but questioned whether a general administrative procedure act would be possible in view of the wide variety of problems dealt with by such districts.

The committee did suggest that consideration should be given to enlarging the scope of Section 1094.5 of the Code of Civil Procedure (Writs of Mandate) to make it specifically available to test the constitutional sufficiency of administrative proceedings.

The committee concluded that the lengthy studies should cease because a really thorough investigation would be necessary before any comprehensive legislation could be prepared, and that such investigation was not feasible. Furthermore, that adoption of uniform policies and practices for the myriad of agencies involved would not be possible. It asked that persons who were aware of any abuses of the exercise of administrative power by local agencies should bring such abuses to the attention of the committee. The committee felt that its proper task is the investigation of and recommendation of measures to eliminate any such abuses as may appear.

Scanning the Minutes and Reports

(EDITOR'S NOTE: The Bulletin Committee receives copies of the minutes of the meetings of the Board of Trustees of the Los Angeles Bar Association and the reports of the various committees of the Association. From time to time the Bulletin will present in this space digests of items from the minutes and reports which are considered by the Editors to be of general interest to the membership.)

The special committee appointed last year by President Gray on courtroom photography recently reported on its study of the problem. The committee found that the Canons of the American Bar Association and the Conference of California Judges which condemn courtroom photography are generally being adhered to in the Los Angeles area. The committee found only two recent instances of a departure from the prohibition *(People v. Legg and Roosevelt v. Roosevelt)* and found that both such instances occurred under circumstances indicating that what happened was not likely to reoccur. The committee concluded in its report that the problem is under intensive study by committees of the American Bar Association and the California State Bar. It recommended that the committee be dissolved since further study of the problem could be conducted better on a national and state level.

The Board has recently adopted a series of resolutions urging adoption of certain legislation pending before the California legislature, including the following:

1. Senate Bill 1603 which would amend Sections 11517, 11519, 11521 of the Government Code and Section 110.5 of the Business and Professions Code so as to provide a method whereby the decision of an administrative hearing officer sitting alone may be appealed to the appropriate state board or commission and so as to make a technical change in the language permitting the appointment of hearing officers in connection with "any" administrative proceedings.

2. Senate Bill 1510 which would add Title II to Part 2 of the Code of Civil Procedure so as to provide for contribution between joint tortfeasors against whom a money judgment has been obtained after one tortfeasor has, by payment, discharged the joint obligation or paid more than his share thereof, with the operation of the proposed statute limited to judgment joint tortfeasors and not applying

to tortfeasors in general and not interfering with the rights of a plaintiff who can still recover his entire judgment against any particular defendant.

3. Senate Bill 1314 which would amend Section 6060 of the Business and Professions Code so as to eliminate correspondence school study as a method of qualifying for the taking of the State Bar examination thereby preventing what appears to be an unfair solicitation of business from prospective law students, only 3/10 of 1% of the students who in the past purchased such correspondence law courses at an average of approximately $450 per student having passed the State Bar examination.

4. Senate Bills 1049, 1050 and 1052 which would add Section 6062a to and amend Sections 6063, 6064, 6065 and 6066 of the Government Code, amend Section 413 of the Code of Civil Procedure and amend Sections 327, 780, 831, 841, 844, 851, 1125 and 1201 of the Probate Code so as to modernize the requirements for publication of various legal notices, inserting clarifying language and eliminating ambiguities and in certain instances eliminating the requirement to publish notice.

5. Senate Bill 1045 which would add Division 5, comprising Sections 1701 to 2207, inclusive, to the Probate Code so as to provide a new procedure modeled upon the existing guardianship statutes for the care of persons and their property without any reference to the terms "insane" or "incompetent" and so as to make possible other long needed improvements as to the appointment of temporary conservators, simplified investment and property management, inventory procedures and bond and court accounting procedures, thereby making available to many elderly and ill persons supervision now denied because they are not mentally incompetent or because members of the family will not charge the existence of insanity or incompetency.